

1                   THE STATE OF ARIZONA  
2                   CITIZENS CLEAN ELECTIONS COMMISSION  
3  
4  
5  
6  
7  
8  
9                   REPORTER'S REVISED TRANSCRIPT OF PUBLIC HEARING  
10  
11  
12  
13  
14  
15                   Phoenix, Arizona  
16                   October 4, 2005  
17                   9:30 a.m.  
18  
19  
20  
21                   (Copy)  
22  
23                   Reported By:  
24                   Angela Furniss Miller, RPR  
25                   Certified Reporter (AZ 50127)

Miller Certified Reporting

1           A PUBLIC MEETING, BEFORE THE CITIZENS CLEAN  
2 ELECTIONS COMMISSION, convened at 9:30 a.m. on October  
3 4, 2005, at the State of Arizona, Clean Elections  
4 Commission, 1616 W. Adams, Conference Room, Phoenix,  
5 Arizona, in the presence of the following Board Members:

6           Ms. Marcia Busching, Phoenix, Chairperson  
7           Ms. Kathleen Detrick, Tucson (Teleconference)  
8           Ms. Tracey Bardorf, Scottsdale  
9           Mr. Gary Scaramazzo, Page  
10          Ms. Emila Jolley, Yuma (Teleconference)

11

12 OTHERS PRESENT:

13          Mr. Todd Lang, Executive Director  
14          Ms. Paula Ortiz, Executive Assistant  
15          Ms. Colleen McGee, Fiscal Service Manager  
16          Ms. Geneva Richardson, Campaign Finance  
17          Manager  
18          Ms. Autumn Southard, Voter Education Manager  
19          Ms. Diana Varela, Assistant Attorney General  
20          Ms. Jessica Funkhouser, Assistant Attorney  
21          General  
22          Mr. Monty Lee, Assistant Attorney General  
23          Ms. Nancy Read, Secretary of State's Office  
24          Ms. Lydia Guzman, Clean Elections Institute  
25          Mr. Doug Ramsey, Clean Elections Institute  
        Ms. Barbara Lubin, Clean Elections Institute  
        Mr. Dan Wooten, Political Advisor  
        Mr. Paul Davenport, Associated Press  
        Mr. David Burnell Smith, State Representative  
        Mr. Alberto Gutier, Citizen, Former Candidate  
        Mr. Paul Peterson, OMA  
        Mr. Robbie Sherwood, Arizona Republic  
        Mr. Christian Palmer, Arizona Capitol Times  
        Mr. Lou Ruggiero, Channel 12  
        Mr. Le Templar, East Valley Tribune

1                   P R O C E E D I N G

2

3                   CHAIRPERSON BUSCHING: This is -- the Citizens  
4   Clean Election Commission will come to order. It's  
5   Tuesday, October 4th, 2005 at approximately 9:35 a.m.

6                   This is the regular meeting open to the public.  
7   We're at 1616 West Adams, Suite 110, Phoenix, Arizona  
8   85007. Notice is given that the Commission may vote to  
9   go into executive session which will not be open to the  
10   public for any item listed on the agenda for obtaining  
11   legal advice. Also, all matters on the agenda may be  
12   discussed, considered, and are subject to action by the  
13   Commission.

14                  Let's go first to the approval. I've called  
15   the meeting to order, we can go to the approval of  
16   minutes of August 25th, 2005 and September 15th, 2005.

17                  And I note for the record that Commissioner  
18   Detrick and Commissioner Jolley are appearing by phone  
19   and the other commissioners are here in person.

20                  Any comments or changes on the August 25th  
21   minutes?

22                  COMMISSIONER BARDORF: Madame Chair, I move  
23   that we approve the August 25th, 2005 minutes as  
24   directed.

25                  COMMISSIONER SCARAMAZZO: I'll second that.

                  Miller Certified Reporting

1 CHAIRPERSON BUSCHING: It's been moved by  
2 Commissioner Bardorf and seconded by Commissioner  
3 Scaramazzo that the August 25th draft minutes be  
4 approved. All in favor say "aye".

5 (Chorus of ayes.)

6 CHAIRPERSON BUSCHING: Opposed, nay?

7 Chair votes aye. Motion carries.

8 Next item on the agenda is the September  
9 15th minutes. Any changes or corrections there?

10 COMMISSIONER DETRICK: I do.

11 CHAIRPERSON BUSCHING: Commissioner Detrick.

12 COMMISSIONER DETRICK: I have a couple of  
13 changes I think on Page 3, Item 5.

14 CHAIRPERSON BUSCHING: Uh-huh.

15 COMMISSIONER DETRICK: It says on the third  
16 line, "attend to workshop." And I think the phrase  
17 would be better that they both encourage political  
18 consultants to attend workshops.

19 CHAIRPERSON BUSCHING: Right. Okay.

20 COMMISSIONER DETRICK: And on Page 5.

21 CHAIRPERSON BUSCHING: Yes.

22 COMMISSIONER DETRICK: On the first full  
23 paragraph on the fourth line, I think there's a spelling  
24 error. I think the word should be and assess a civil  
25 penalty with two "S"s.

1 CHAIRPERSON BUSCHING: Right.

2 COMMISSIONER DETRICK: And then also on that  
3 page on the next paragraph, I believe the word on the  
4 second line capital, is capital with an A.

5 CHAIRPERSON BUSCHING: Okay.

6 COMMISSIONER DETRICK: And I think on Page 6 on  
7 the third full paragraph, the final sentence, it says,  
8 "According Mr. Lemon recommended" -- I think it's  
9 recommended that -- recommended to the Commission maybe.  
10 Recommended to the Commission that the matter be  
11 dismissed. There's a word missing.

12 CHAIRPERSON BUSCHING: Right.

13 And I have an additional one on Page 4 of  
14 the top paragraph, the last sentence, Chair Busching  
15 noted she fully supports the conciliation agreement that  
16 is currently -- it should be in front of the Commission.

17 Any other changes or corrections? If not I'll  
18 entertain a motion.

19 COMMISSIONER BARDORF: I just have one actually  
20 additional change, I just noted on Page 4, Line 4.  
21 Querard, Mr. Querard's name has an additional "R" that  
22 shouldn't be there I believe. I think he's one "R".

23 With that and the other changes, I would move  
24 that we approve the September 15th minutes.

25 CHAIRPERSON BUSCHING: Is there a second?

1 COMMISSIONER JOLLEY: I'll second that. This is  
2 Commissioner Jolley.

3 CHAIRPERSON BUSCHING: It's moved by  
4 Commissioner Bardorf and seconded by Commissioner Jolley  
5 that we approve the September 15th minutes. All in  
6 favor say "aye".

7 (Chorus of ayes.)

8 CHAIRPERSON BUSCHING: Opposed, nay?

9 Chair votes aye. The motion carries.

10 Item III, executive director's report. Mr.  
11 Lang.

12 MR. LANG: Thank you. Madame Chair, good  
13 morning. Commissioners, good morning.

14 You have your report before you and I'll just  
15 give you the highlights. I've sent out letters  
16 expressing my interest for feedback from the state  
17 legislature, both from all the senators and all the  
18 state reps in our district. I let them know who I am  
19 and let them know I'm very interested in meeting with  
20 them and would like to meet. I have met with one  
21 senator and look forward to meeting with more as soon as  
22 possible.

23 Let's see, we've begun preparing the five-year  
24 review update and we're working with Dean Wright, very  
25 knowledgeable expert on wolves and Jennifer Richardson

1 has been doing the heavy lifting. And we're working on  
2 that and we'll have it finished in time.

3 COMMISSIONER BARDORF: Is Mr. Wright at the  
4 AG's Office or how does he --

5 MR. LANG: He -- he works at the Board of  
6 Pharmacy, but he's not at the AG's Office.

7 Let's see, five year -- the New Jersey \$5  
8 contribution rule, Chair Busching asked me to look into  
9 that. And, we could do that. And, in fact, under our  
10 statute, that sort of set up is permissible that  
11 basically a check card as opposed to a check. You know,  
12 allowing candidates to use a check card for convenience.

13 And you can see in my report, the key issue  
14 there is that the fees -- that the fees are deducted as  
15 an expense, that the person not be asked to pay extra or  
16 anything of the sort.

17 The challenge is and Colleen McGee is working  
18 on the administrative challenge because of the way DOA  
19 and the Secretary of State set up their software and  
20 accounting systems, we're not ready to totally  
21 accommodate that yet. But she's looking to see how  
22 feasible that is.

23 Staffing. We have outstanding applicants for  
24 Deputy Director. Perhaps you should reconsider them for  
25 Executive Director. We have some great folks. I'm very

1 excited about them and I will be calling them this week  
2 for interviews. So, I look forward to meeting with  
3 them.

4 And Paula is working on replacing a staff  
5 member as well. So, as you know, as indicated there, we  
6 have over a 140 applications for the Administrative  
7 Assistant position. So, again, a nice problem to have,  
8 too many good folks.

9 The Auditor General's Office. The Auditor  
10 General is very helpful. They went out of their way to  
11 understand the Clean Elections Act. I think they found  
12 it very challenging and their suggestions were helpful  
13 and reasonable. So, we certainly appreciate all their  
14 efforts.

15 And enforcement. You have the statistics  
16 there, really nothing new there.

17 So, unless the commissions have any questions,  
18 that is my report.

19 CHAIRPERSON BUSCHING: Thank you. Any  
20 questions of Mr. Lang? None.

21 We'll go on to Item IV, discussion and possible  
22 action on the following enforcement matters: A,  
23 MUR-04-0041, Bruce Murchison. Discussion and possible  
24 action on recommended decision of Administrative Law  
25 Judge.



1           Mr. Lang, are you handling these or presenting  
2 these?

3           MR. LANG: I actually thought Mr. Lee was  
4 presenting this particular matter, but perhaps I'm  
5 mistaken.

6           MR. LEE: I am available and happy to answer  
7 any questions that the board -- the Commission may have.  
8 What you have before you, again, is a recommended  
9 decision by the Administrative Law Judge. Your charges  
10 will be to review it, determine whether or not you will  
11 affirm, modify or reject it.

12          CHAIRPERSON BUSCHING: Okay. All right. As  
13 you heard Mr. Lee, our job is to affirm, modify or  
14 reject the Administrative Law Judge's decisions.

15          Does anyone have any questions or comments? If  
16 not, the Chair will entertain a motion.

17          COMMISSIONER DETRICK: I will.

18          CHAIRPERSON BUSCHING: Commissioner Detrick.

19          COMMISSIONER DETRICK: I move we accept the  
20 recommendation of the Administrative Law Judge in MUR  
21 04-0041 regarding Bruce Murchison and Mr. -- Mr.  
22 Murchison's appeal be denied; and that our May 27th,  
23 2005 order be affirmed and that Mr. Murchison shall pay  
24 the Commission a civil penalty in the amount of \$1,278.

25          CHAIRPERSON BUSCHING: Okay. Is there a

1 second?

2 COMMISSIONER BARDORF: I apologize. I just  
3 have one quick question for Diana Varela.

4 CHAIRPERSON BUSCHING: Well, let's get a  
5 second.

6 COMMISSIONER SCARAMAZZO: I'll second. Get it  
7 on the floor.

8 COMMISSIONER BARDORF: It has to do with the  
9 outcome of this.

10 CHAIRPERSON BUSCHING: You can ask your  
11 question.

12 COMMISSIONER BARDORF: All right.

13 CHAIRPERSON BUSCHING: All right. It's been  
14 moved by Commissioner Detrick and seconded by  
15 Commissioner Scaramazzo that the Administrative Law  
16 Judge's order be affirmed.

17 Any questions or comments?

18 COMMISSIONER BARDORF: Yeah, I have a question.  
19 I know that we were discussing that there's an issue  
20 about the telemundo (phonetic) refund. How does that  
21 get addressed? Is it separate from this? Was that not  
22 something before the ALJ?

23 I remember we had a discussion about the fact  
24 that surplus now in the account actually had to be paid  
25 back to the Commission, but it's -- maybe I misread.

1 MS. VARELA: If you look at -- in the  
2 conclusions of law, paragraph four, it talks about the  
3 refund. It's somewhat separate. It was -- he was not  
4 -- as the Commission had decided, and as we argued to  
5 the ALJ, he was not able to apply that refund towards  
6 the \$1,278 overspending. While it wasn't specifically  
7 addressed in here in terms of ordering him to pay it  
8 back, I mean it would be a separate issue.

9 COMMISSIONER BARDORF: So, this still needs to  
10 be addressed or --

11 MS. VARELA: Probably so.

12 CHAIRPERSON BUSCHING: Any other questions or  
13 comments?

14 If not, the Chair will call for the question,  
15 all in favor of affirming the Administrative Law Judge's  
16 order and requiring Mr. Murchison to pay the Commission  
17 the civil penalty of the amount of \$1,278.48 say "aye".

18 (Chorus of ayes.)

19 CHAIRPERSON BUSCHING: Opposed, nay?

20 Chair votes aye. Motion carries.

21 Next item is Item IV, B, MUR 04-0020. David  
22 Gowan. Discussion and possible action regarding  
23 designating Commission representatives for purpose of  
24 informal settlement conference requested by David Gowan.

25 Mr. Lang.

1           MR. LANG: Thank you, Madame Chair. As you  
2   will recall on August 26th, the Commission found  
3   reasonable cause and found a violation of our campaign  
4   finance statute and ordered a \$10,000 fine and gave him  
5   the proper notices of his right to appeal and right to  
6   administrative hearing. Mr. Gowan availed himself of  
7   that right and asked for the administrative hearing and  
8   it has been set for November 17th.

9           In the meantime, he has also asked for an  
10  informal settlement conference and that's why this  
11  matter is before the Commission today. So, the  
12  Commission can in our tradition designate usually a  
13  Commission member to negotiate with Mr. Gowan.

14          CHAIRPERSON BUSCHING: Okay. Is there anyone  
15  here from the public wishing to speak to this matter?

16          Okay. Any questions or comments by Commission  
17  members?

18          MS. VARELA: Chair Busching, if I may add just  
19  to remind the Commission, under the commission's rules  
20  the informal settlement conference has to be held within  
21  15 days from the date the Commission receives it. So  
22  the informal settlement conference under the rules has  
23  to be held no later than October 10th -- so, today --  
24  which is why it was on the agenda.

25          CHAIRPERSON BUSCHING: Right. Do you know if

1 Mr. Gowan makes or appears to Phoenix regularly or is  
2 this something that's going to need to be handled  
3 preferably for him down closer to his --

4 MS. VARELA: I don't know.

5 CHAIRPERSON BUSCHING: -- location?

6 MR. LANG: I don't know. He didn't specify  
7 where he wanted the settlement conference to occur.

8 CHAIRPERSON BUSCHING: Okay. I'm inclined to  
9 volunteer Ms. Detrick if you're available. Ms. Detrick,  
10 are you since you're sort of down in that direction?

11 COMMISSIONER DETRICK: Madame Chair, I'm really  
12 sorry. My election duties are -- I'm getting close to  
13 my November election. It's very difficult for me to do  
14 this. I do understand that the 10th is actually Monday,  
15 and that's a holiday for a lot of folks. So that would  
16 mean he'd have to do it right now. I'm just looking at  
17 my schedule.

18 CHAIRPERSON BUSCHING: Okay. Well, I mean, we  
19 certainly understand if that's not feasible. I don't  
20 want to impose on you. Your duties as a commissioner  
21 and being in attendance here, we certainly appreciate  
22 that.

23 So, I'll maybe -- since Commissioner Detrick  
24 really isn't available I'll ask for volunteers. Is  
25 there any Commission members that are available between

1 now and the 10th.

2 You say that would be --

3 MR. LANG: Madame Chair, if the Commission

4 members are not available, I'll be willing to do it.

5 But if the commissioners are available, I think that's

6 preferable.

7 COMMISSIONER JOLLEY: Madame Chair, this is

8 Commissioner Jolley.

9 CHAIRPERSON BUSCHING: Yeah.

10 COMMISSIONER JOLLEY: I'm out of town through

11 the 12th as stated, excuse me.

12 COMMISSIONER BARDORF: Well, I don't actually

13 have my calendar. Is it possible for us to find out

14 whether he needs someone to go to him or closer to him?

15 I mean, it makes a huge difference whether it's

16 something that's going to happen here or telephonically,

17 or something that's going to happen in Sierra Vista.

18 Right?

19 COMMISSIONER SCARAMAZZO: True.

20 COMMISSIONER BARDORF: Is there any way we can

21 get a hold of him?

22 MR. LANG: I'll be happy to call him.

23 COMMISSIONER BARDORF: And find out what his

24 schedule is, because obviously we need to find a date

25 and time.

1 MS. VARELA: Right. I mean, the other  
 2 possibility is if you're going to call him anyway, ask  
 3 him if he's willing to be a little bit flexible on the  
 4 date and go into next week. If he were to insist on it,  
 5 he's entitled to the informal settlement conference  
 6 within 15 days, but if he's willing on such short notice  
 7 and where Monday is a holiday, say, I'm willing to wait  
 8 until next Tuesday or Wednesday, that's fine too. Just  
 9 that we can't be the one to delay.

10 COMMISSIONER BARDORF: Right.

11 CHAIRPERSON BUSCHING: Okay. Should we defer  
 12 this until later on in the agenda and we'll try to make  
 13 some phone calls in the meanwhile?

14 Okay. We'll come back to this then.

15 CHAIRPERSON BUSCHING: The next item on the  
 16 agenda is Item IV, C, MUR 04-0023, David Burnell Smith.  
 17 Discussion and possible action regarding motion for  
 18 rehearing or review. Possible executive session  
 19 pursuant to ARS section 38-431.03(A) 4, that is  
 20 executive session for consulting with Commission  
 21 attorneys regarding pending or contemplated litigation.

22 Is anyone -- Mr. Lang, is anyone from the  
 23 Commission going to present anything on this?

24 MR. LANG: Well, Madame Chair, Monty Lee from  
 25 the Attorney General's Office is here to advise the

1 Commission and that's really the status of the case.

2 CHAIRPERSON BUSCHING: Welcome, Mr. Lee.

3 MR. LEE: Good morning.

4 CHAIRPERSON BUSCHING: I understand -- well, do  
5 you want to have -- do you have anything you want to  
6 start out by saying or anything?

7 MR. LEE: Madam Chairman, it will be up to the  
8 Commission to determine whether they would like to hear  
9 presentations. I believe Representative Smith has filed  
10 a motion for rehearing. He has submitted that in  
11 writing. A response has been filed by the Attorney  
12 General's Office.

13 If you understand the issues well enough and  
14 are prepared to move forward, you can certainly do that.  
15 However, if you would like to afford the parties an  
16 opportunity to make written arguments or submit written  
17 arguments in that regard -- oral arguments -- on other  
18 motions, you can certainly do that at this time.

19 Any legal questions you would like to  
20 specifically address in their arguments, you can also do  
21 that. Upon hearing those arguments, you will also make  
22 a decision on whether to grant the rehearing or not.

23 COMMISSIONER BARDORF: I'm sorry, I guess I  
24 don't understand. The motion for rehearing is to have a  
25 new hearing before the ALJ; is that --



1 MR. LEE: If you were to grant rehearing, grant  
2 it in full or in part, if there's specific issues that  
3 you believe would benefit from returning it to the  
4 Administrative Law Judge for further proceedings, you  
5 may do that. Or, if you believe sufficient ground has  
6 been stated for complete rehearing, that is start the  
7 process of hearing before the Administrative Law Judge  
8 from scratch, you may do that also. Or, if you believe  
9 no ground has been stated justifying the hearing, you  
10 can certainly deny the hearing.

11 COMMISSIONER BARDORF: And this is sort of  
12 going on a tandem track with the civil complaint in  
13 Superior Court; is that right?

14 MR. LEE: I was informed an action has been  
15 filed and I got a look at it this morning. It's nature  
16 in essence is dual relief. It's entitled Special Action  
17 Complaint but seeks the judicial review of  
18 administrative decision. That may be one of the  
19 positions you would like the parties to comment on:  
20 What effect, if any, the filing of that suit has on the  
21 commission's consideration for motion for rehearing this  
22 morning.

23 CHAIRPERSON BUSCHING: Other questions of Mr.  
24 Lee at this point?

25 If not, I'll entertain comments from the

1 public. And as part of the comments, I would like to  
2 have the parties address whether the Commission has  
3 jurisdiction to entertain a motion for rehearing or  
4 review at this point since there has been an action  
5 filed in the Superior Court.

6 So -- and I understand that Mr. Smith, would  
7 you like to speak?

8 MR. SMITH: I would.

9 CHAIRPERSON BUSCHING: Okay.

10 MR. SMITH: Thank you for the opportunity  
11 Chairman. And Mr. Lang, don't go away because I'm  
12 looking forward to talking to you regarding the  
13 executive director's position since the committee is  
14 trying to remove me from my a present condition and I  
15 know that you pay well.

16 In all seriousness, thank you. And let me sit  
17 down. Let me just say this, that we have filed this  
18 Motion For Reconsideration and I think certain matters  
19 you should review today.

20 Would you please hand out --

21 We have filed an amended financial statement  
22 which provides the Commission with the information you  
23 requested as far as what they call the vendor complaint,  
24 the sub vendors for Mr. Querard. As you know, you  
25 discussed those complaints about Colette Rosati and

1 others who have amended complaints to comply with that  
2 requirement. In fact, Rick Murphy did not amend and you  
3 dismissed his complaints for the same reasons.

4 In fact, I will tell you this, that out of 118  
5 clean election candidates, 63 made lump sum payments to  
6 campaign consultants or vendors. That's 54 percent.  
7 Let me read some of the names of those who were not  
8 charged and did not receive complaints, but did the same  
9 thing I did. And some of them did the same thing I did.

10 Kris Mayes, Corporation Commission. Bill  
11 Mundell, Corporation Commission. Ron Gould, State  
12 Senate. Bill -- Linda Gray, Ken Cheuvront, Harry  
13 Mitchell, John Huppenthal, Rebecca Rios, Trish Groe, Tom  
14 Boone, Judy Burges, Ted Carpentar, Pamlea Gorman, Rick  
15 -- Virgil Cane, David Smith, Colette Rosati, Rick  
16 Murphy, John Allen, Steve Tulley, Jerry Wiers, Steve  
17 Gallardo, Martha Garcia, David Lojan, Krysten Sinema,  
18 Leah Landrun, Burton Cahill, Laura Knaperek, John  
19 McComish, Amanda Aguirre, Manuel Alvarez and Phil Lopez.

20 All of which did lump sum payments. I've gone  
21 beyond that. I wrote a letter to Mr. Querard asking  
22 that he give me the list of his sub vendors. He refused  
23 to do so. The Attorney General's Office subpoenaed his  
24 records. They obtained those records. I then obtained  
25 your records. I then took it to my accountant and he

1 did -- and did the filing.

2 Same as what Colette Rosati did. She obtained  
3 the records. She filed the amended reports and you  
4 accepted that and dismissed that claim. Rick Murphy did  
5 not and you dismissed his claim. Still don't know the  
6 reason why you did that, but have the reasons. But have  
7 made the point.

8 I'm the last man standing as the old Bruce  
9 Willis movie was. I'm just asking to be treated the  
10 same way in that regard. Now, we've given you the  
11 up-to-date financial reports from my campaign, "Smith  
12 for Senate". Those reports are the ones that you should  
13 make those determinations on, not those that were filed  
14 in error. Not the ones that were filed before. But as  
15 the Secretary of State, those are the files that are of  
16 record as of today. They're on the web site. If you go  
17 get the campaign reports from the web site, that's the  
18 one you obtain.

19 I'm asking all of you before you vote on this  
20 matter, look at that and tell me where in that report  
21 that I overspent. Tell me in that report where I  
22 overspent for \$6,000. Tell me in that report that's  
23 done by an accountant who was the legislature of the  
24 year for the country voted, I think, I think, 1996, Jeff  
25 Hill. So those are accurate reports.

Miller Certified Reporting

1 I just say give me the time of day. Give me  
2 the time to consider this. Seriously look at that and  
3 tell me, and tell the general public, and tell the  
4 people and voters of District 7 where I overspent. I'll  
5 tell you folks, it's just not there. It shows clearly  
6 that I did not overspend and that those records are  
7 accurate.

8 We made some mistakes in our previous filings.  
9 We admitted that. If you want to say you filed a lot of  
10 amended complaints, yes, I have. I agree with that.  
11 But now we did it, it's your request, it's your request.  
12 We have the list of vendors, we did that. Just asking  
13 at least consider that one claim and dismiss that. Rest  
14 of it I know you want to -- you know, a denial of  
15 reconsideration, I understand that because we had the  
16 hearing. We'll go forward with it.

17 Let me make a statement with regard to the  
18 lawsuit filed. That lawsuit has been filed not served.  
19 The reason for that, there was some discussions among my  
20 attorneys who had different opinions whether the statute  
21 was tolled during the pendency of the Motion For  
22 Reconsideration. To be on the safe side, we filed it  
23 and did not serve it on the basis we didn't want to have  
24 the Attorney General say, hey, the Motion For  
25 Reconsideration did not stay the 35 days to make the

1 appeal. We did that for that reason to protect our  
2 standing with that lawsuit. But we filed the Motion For  
3 Reconsideration before we did that and I think the  
4 motion should be heard.

5 That's -- that's basically all I have to say.  
6 I'm just asking that you -- that you give me the same  
7 treatment that you've given Rick Murphy, and Colette  
8 Rosati, and the rest of the folks that amended their  
9 complaints -- financial statement regarding complaint  
10 for the vendors. If you do that, I think you -- well,  
11 you will understand that looking at the reports that  
12 we've complied.

13 Thank you very much for the opportunity to talk  
14 to you today and to be here.

15 COMMISSIONER SCARAMAZZO: Thank you.

16 CHAIRPERSON BUSCHING: Thank you, sir. Anyone  
17 else wishing to speak as to this matter?

18 Ms. Varela.

19 MS. VARELA: Yes, Chairperson and  
20 commissioners, to answer your original question --

21 CHAIRPERSON BUSCHING: Before you get there,  
22 would you explain for not only the commissioners but the  
23 members of the public what your role is here today?

24 MS. VARELA: We are your attorneys, but in this  
25 matter we prosecuted the Smith matter and that's why

1     there is independent counsel here. That's why Mr. Lee  
2     is here today to provide you legal counsel. I'm here in  
3     the role as advocate for the decision that the  
4     Commission made and that the ALJ affirmed in his  
5     recommendations order.

6             CHAIRPERSON BUSCHING: Okay. Thank you.

7             MS. VARELA: So, what I would like to do is  
8     first address your question in terms of whether the  
9     Commission still has jurisdiction to consider the motion  
10    for rehearing. We don't believe that the Commission has  
11    lost jurisdiction over Mr. Smith's motion. And we would  
12    urge the Commission to deny his motion for rehearing or  
13    review.

14            The next thing I would like to do is speak to  
15    some of the substance of Mr. Smith's comments. Mr.  
16    Smith made -- has passed out amended campaign finance  
17    reports that were filed just a few weeks ago. And we  
18    would urge the Commission not to consider these reports  
19    for a couple of reasons. One, the Clean Elections Act  
20    and the Commission's rules have to mean something. The  
21    Commission has embarked on a very long enforcement  
22    proceeding in the Smith matter. And Mr. Smith didn't  
23    amend his campaign finance reports or even attempt to  
24    report the sub vendors for Constatine Querard until  
25    after we had gone to hearing and he had lost.

1           There would be no -- if the Commission were to  
2   consider those reports or were inclined to issue or to  
3   grant his motion for rehearing on those issues, that  
4   there would be no incentive for candidates in the future  
5   to comply with the reporting requirements in a timely  
6   manner. They would just decide we're going to do  
7   whatever we want to because the Commission, as long as I  
8   can come into compliance at some future date down the  
9   road, I have no incentive to comply with the rules,  
10   comply with the reporting requirements that in some  
11   cases may trigger matching funds.

12           And I think if the Commission gives in at this  
13   extremely late date after the hearing, after he has  
14   already received an adverse decision from the  
15   Administrative Law Judge, future candidates are going to  
16   know or at least be led to believe by this decision that  
17   they can get away with the same thing.

18           And he -- he lists a number of other candidates  
19   that he claims did the same thing that he did. I cannot  
20   speak to all of those. I don't know if that is true  
21   with respect to all of those people. But with Colette  
22   Rosati, I would like to point out that the Commission  
23   made its decision prior to the hearing. In Pamela  
24   Gorman's matter, I do remember that the 948(c) issue was  
25   an issue. Ms. Gorman came into compliance during the 14



1 days after the order of compliance was issued. That's  
2 when the reason-to-believe decision is made. That's  
3 very early in the enforcement process.

4 And secondly, with respect to the reports. To  
5 the extent that the Commission were inclined to review  
6 them substantively, they still aren't sufficient to  
7 comply with 948(c). If you look at Mr. Querard's  
8 invoices he lists the name of different mailers that he  
9 had produced on Mr. Smith's behalf.

10 For example, education mail or immigration mail  
11 or intro to David Smith mailer. If you go through this  
12 report, there's nothing tying the sub vendors to any one  
13 particular mailer. There still is, I think,  
14 insufficient detail to comply with 948(c). And I would  
15 urge the Commission that these are not the controlling  
16 reports, number one. Number two, to the extent that the  
17 Commission were at all inclined to consider them, that  
18 they're still not sufficient to comply with the Clean  
19 Elections Act.

20 Another point that Mr. Smith makes is that  
21 these campaign finance reports that were filed very  
22 recently don't show overspending. And what I would  
23 submit to the Commission is that they're not going to  
24 show overspending because that's what he wants them to  
25 show.

1           The underlying documentation that the  
2   Commission received through its subpoenas. During the  
3   course of the investigation, that the auditors compiled,  
4   that Mr. Lemon compiled and were reviewed in great  
5   detail, support the Commission and ALJ's conclusion that  
6   Mr. Smith did, in fact, overspend his primary election  
7   limit.

8           And I guess that would be it. I would just,  
9   again, we would ask the Commission to deny Mr. Smith's  
10   motion for rehearing or review.

11          CHAIRPERSON BUSCHING: Okay. Thank you. Any  
12   other members of the public wishing to speak to this  
13   matter?

14          MR. SMITH: Commissioner, may I address one  
15   point?

16          CHAIRPERSON BUSCHING: Yes.

17          MR. SMITH: In regard to the 948(C) argument  
18   which Ms. Varela just addressed, I'd ask you to look at  
19   Colette Rosati's amended report. I think I'm in  
20   compliance with exactly what she did. If her reports  
21   were accepted for 948, what is the difference between  
22   mine?

23          I suggest that we did comply. We gave the sub  
24   vendors' names, their addresses, there's no requirement  
25   that we tie into every single mailing. We have to

1 indicate what the vendors, who they were, what we paid  
2 them, and that's exactly what we did. That's exactly  
3 what Colette Rosati's did.

4 I think we're in compliance with 948(c). I ask  
5 you to compare the reports and I think the reports are  
6 accurate. I didn't address the other points because I  
7 think I've sufficiently addressed them.

8 Thank you once again, Madame Chair.

9 CHAIRPERSON BUSCHING: Thank you. I just might  
10 note, I'm personally familiar with Colette Rosati's  
11 situation since I was the designated representative on  
12 the settlement there. And while I didn't go to the  
13 Secretary of State's web site to look at what the  
14 reports were, I know at least in the settlement  
15 conference we got sufficient detail to comply with the  
16 statute. So, maybe it was an error on my part that I  
17 didn't confirm with the Secretary of State's filing  
18 reports, but in fact the Commission did receive  
19 sufficient detail.

20 Any questions or comments by members of the  
21 Commission?

22 I think I'd like to go into executive session  
23 and receive some legal advice on a couple of these  
24 issues that have come up. But before we do that --

25 COMMISSIONER BARDORF: I guess I have a couple

1     comments. One, you know, it's -- this is not a -- as I  
2     voiced before, I think that the troubling part here is  
3     that the penalty is so high and so punitive. But at the  
4     same time, I guess, without having had the benefit of  
5     more than a very cursory review of these reports that we  
6     did not have until 10 minutes ago, I'm puzzled at the  
7     sort of vast difference between each iteration of the  
8     finance reports. I think this is the fourth iteration.

9             And on the complaint it specifically says in  
10    Mr. Smith's complaint that he's paid Mr. Querard \$17,000  
11    on August 9th I think it is. \$17,778 on August 9th.  
12    And I seem to remember in our March meeting that there  
13    were extensive discussions about those payments and  
14    extensive discussions about the checks and who signed  
15    them and when they went out.

16            And, meanwhile, this CFR doesn't show any of  
17    those payments to Mr. Querard. I'm kind of confused as  
18    to how the humongous difference and when this  
19    information came out.

20            And I guess, you know, to the extent this is  
21    based on the same information as before, you know, it  
22    doesn't -- it doesn't seem very possible that the  
23    difference could be that vast.

24            With all due respect, the Brooklyn bridge  
25    argument doesn't really work, because, you know, what

1 we're dealing with is these reports, not every other  
2 candidates' reports. So, unless there's some sort of  
3 other reason that these are so different, it's hard for  
4 me to understand how it can be in this position now.

5 CHAIRPERSON BUSCHING: Is that a comment or is  
6 that a question to Mr. Smith?

7 COMMISSIONER BARDORF: I would like to hear --  
8 I certainly don't want to take your opportunity to  
9 answer that.

10 MR. SMITH: If that's directed to me, I would  
11 be happy to answer it. Let me tell you, and Ms. Varela  
12 could verify this, I think at the commissioner law judge  
13 hearing, Commissioner Hill went through the bank account  
14 from the first date of the first check and last date to  
15 the last check. He went through and itemized every  
16 single check. He did a complete review of the banking  
17 system and the reporting system to make sure those  
18 checks that were written, were written at the date that  
19 the report said they did.

20 He found numerous errors. And one of the  
21 reasons was, as he's testified, is there were carbon  
22 copies, some of the checks were written over carbon  
23 copies and couldn't see the date on it.

24 But he went through it and found the date the  
25 bank received them and looked at the check more

1 carefully. In fact we gave one of the checks to the  
2 Administrative Law Judge, he looked at and said, yeah,  
3 he can see how you came to that date.

4 That's the reason Mr. Hill went through and got  
5 every single check in the order they were written, at  
6 the time they were written, and based those reports on  
7 his re-analysis of when the checks were written and how  
8 they were written and to whom they were written.

9 COMMISSIONER BARDORF: So --

10 MR. SMITH: If you would like to have those  
11 reports, the reports are available. I would be happy to  
12 submit them to you before you make the decision. But  
13 you question the accuracy of that report, in fact, Mr.  
14 Hill said he would be available if you want him to come  
15 and testify sometime regarding those reports, but they  
16 are accurate.

17 COMMISSIONER BARDORF: To help me understand  
18 all that information about the checks, you had prior to  
19 the hearing? That these are based on; you had that  
20 prior to the hearing?

21 I just want to understand how we now have a  
22 fourth set today.

23 MR. SMITH: The fourth set -- the third set  
24 reflected the same figures. The fourth set just  
25 reflects the sub vendors, which we didn't have at that

1 time when Mr. Querard testified under oath. He would  
2 not give it to us. But which the Attorney General had  
3 subpoenaed his records. After the hearing, we went back  
4 and got these records. And after you made your ruling  
5 with Colette Rosati, to be honest, I got to tell you I  
6 had it transcribed what you said: The amended reports  
7 are now in compliance, all be it she was late.

8 So when she did that, I felt that if I amended  
9 mine, you'd give me the same treatment if I amended  
10 mine. I gave it to Mr. Hill. I'm telling you, it was  
11 tedious. It was tedious for him to break that down and  
12 give you that report. He will be happy to testify but  
13 that's the reason why. Once you made the decision about  
14 Colette Rosati we can amend, we said, Mr. Hill, let's  
15 give them what they want.

16 Although, we disagree, Madame Chair, we still  
17 disagreed you can do that, but we'll say we'll give up  
18 on that issue, we'll give it to you. So we'll amend our  
19 reports, which we've done. Mr. Hill has done that. So  
20 that's the answer to your question.

21 COMMISSIONER BARDORF: But it said on August  
22 9th there's \$17,000 worth of checks. Now there's  
23 nothing. There's nothing at all, nothing even close to  
24 that because the payments don't even start until after  
25 that. Is that based on the dates, the new dates for Mr.

1 Hill and new names of recipients for the same money?

2 MR. SMITH: Correct. But the amended report  
3 accurately reflects to where we made the change and to  
4 how we made the change.

5 COMMISSIONER BARDORF: The complaint said the  
6 third report, August 9th --

7 MR. SMITH: I believe that that --

8 COMMISSIONER BARDORF: I understand we're not  
9 in court. I just want you to understand where we're  
10 coming from and what we're seeing here.

11 MR. SMITH: I can tell you, Mr. Hill has told  
12 me that he spent hours going through it and making sure  
13 it's accurate. He'll be welcome to compare them. I  
14 just talked to him last evening and he verified the fact  
15 that these were accurate reports.

16 CHAIRPERSON BUSCHING: I have a question for  
17 Mr. Smith as well.

18 MR. SMITH: Yes, ma'am.

19 CHAIRPERSON BUSCHING: On one of our prior  
20 hearings I was in the minority on my vote on allowing  
21 one of the candidates to amend their campaign finance  
22 report without assessing a fine, because I -- I agree  
23 with the Attorney General on her argument that we can't  
24 allow candidates to be able to amend their reports at  
25 any time in the future without, you know, having there



1 be some repercussions.

2 How do you address that issue, Mr. Smith?

3 MR. SMITH: Thank you, Madame Chair. I'm glad  
4 you asked the question. The answer to the question is  
5 because we're required by the statute to do so. The  
6 statute says any time you have information that a prior  
7 report is not factual, is not accurate, you must under  
8 the law file an amended report to reflect what's  
9 accurate and what's true. And that's what we're doing  
10 here. We want to give you the facts. That's what I've  
11 done. I want to give you the true, complete picture.

12 She's right. You don't want to wait forever,  
13 but if you find something that's two months later, or  
14 six months later, or in this case almost a year, you  
15 have a duty and responsibility under the statute to make  
16 that amendment. You have to go to the Secretary of  
17 State and ask to reopen, which we did. And filed the  
18 amended reports.

19 CHAIRPERSON BUSCHING: Are you in agreement  
20 that we should not encourage, overly encourage, that  
21 behavior by not assessing -- I mean, we should be  
22 assessing some fine in that situation so that people  
23 have -- take the responsibility to file reports  
24 correctly the first time?

25 MR. SMITH: Madame Chair, if you think your

1 authority gives you the right to fine me to file correct  
2 reports as I'm required under the law, I say you should  
3 do it. I think you should do everything possible to  
4 encourage people to file accurate reports. That is,  
5 don't fine them when they come back later and say,  
6 Madame Chairman, are you going to give me a fine? I  
7 think that's -- doesn't do a service to the people.

8 I would say this. Yes, I did file some amended  
9 reports. Guilty. But I did so trying to correct some  
10 misstatements in the previous reports, was trying to be  
11 accurate. Those reports are accurate. And, yes, I do  
12 have responsibility under the law to file the amended  
13 reports.

14 COMMISSIONER BARDORF: So we understand, so  
15 there are checks that match up to these expenditures  
16 with the dates and recipients.

17 MR. SMITH: I'll be happy to provide you the  
18 checks, the date of checks, I'll give you the copies of  
19 the original checks.

20 COMMISSIONER BARDORF: Will they be different  
21 checks that won't match the last one?

22 MR. SMITH: Let me explain to you. We only had  
23 one bank account. The checks were written and the  
24 Commission found the reason why I did it knowingly is  
25 because I signed the checks. I admit that I signed the

1 checks. But every check I signed balanced. There was  
2 never a time that bank account was ever in the red.  
3 That was the only one bank account that we used. That  
4 was from beginning to end.

5 If the Commission would like, Madam Chair, I'll  
6 provide you with the checks, the ledger done by Mr. Hill  
7 which will verify -- and you can look at the date the  
8 check was written and look at the ledger and make sure  
9 it was there. Because I think you should be comfortable  
10 and you should know whether or not that report is  
11 accurate. Mr. Hill verifies to me it is accurate. I  
12 trust him.

13 Thank you.

14 CHAIRPERSON BUSCHING: Thank you. Ms. Varela.

15 MS. VARELA: Yes, Chairperson and  
16 Commissioners, thank you.

17 I would like to address a few of the points  
18 that Mr. Smith has just made. Particularly with respect  
19 to Commissioner Bardorf's questions about the reports.  
20 I would just like to direct the Commission's attention  
21 to the finding of fact that the Administrative Law Judge  
22 made in the case with respect to Mr. Hill's testimony  
23 and final conclusions which was -- which we think was  
24 proper was that he gave Mr. Hill's testimony very little  
25 weight because Mr. Hill didn't understand the law.

1           If you look at Finding of Fact No. 86  
2           specifically, and I'm quoting, "The most significant  
3           deficiency in Mr. Hill's testimony is that it was based  
4           on the misunderstanding of the law regarding campaign  
5           expenditures."

6           So I think that -- I think that the Commission  
7           should take that into consideration. And if you start  
8           at Finding of Fact 83 to 87, those are specific findings  
9           of fact with respect to Mr. Hill's testimony.

10          Mr. Smith just said that he would provide you  
11          checks and that his checkbook always balanced. And I  
12          can't speak to the accuracy of that statement, but  
13          whether the checkbook balanced or not, is not the  
14          determining factor as to whether or not he overspent his  
15          primary election spending limit. So I would just like  
16          to make that point to the Commission.

17          And then with respect to Mr. Smith's point that  
18          he shouldn't be fined because he's finally come into  
19          compliance. He's admitted that he made a mistake. I  
20          would just like to reiterate to the Commission that he's  
21          done so -- to the extent that he's done that, and again  
22          I still don't think they are sufficient, but to the  
23          extent that he's done that, he's done that after the  
24          Commission made a reason to believe finding, issued an  
25          order requiring compliance, giving him 14 days to come

1 into compliance after an audit, after an investigation,  
2 after a probable cause recommendation by Mr. Lemon to  
3 Mr. Smith, a lengthy response from Mr. Smith and his  
4 accountant, and then a probable cause finding by the  
5 Commission, informal settlement and a hearing.

6 So, it's not that he hasn't been aware that  
7 this has been a concern of the Commission. And to the  
8 extent that he relied on documents that were provided to  
9 the Commission by Mr. Querard, Mr. Querard was deposed  
10 on December 1st. The Commission has been in possession  
11 of those documents since December 1st. We are now in  
12 September. Mr. Smith has been aware --

13 COMMISSIONER BARDORF: October.

14 CHAIRPERSON BUSCHING: October.

15 MS. VARELA: October, yes, sorry. I'm behind.

16 Mr. Smith has been aware. So, you know,  
17 like I said, these -- these rules and these statutes  
18 have to mean something. If the Commission issues an  
19 order requiring a compliance and can't do it in 14 days  
20 but they can do that in 21 days, maybe that's something  
21 the Commission wants to consider. But to go through an  
22 entire enforcement, including a hearing at which Mr.  
23 Smith lost, I think that you really undermine the  
24 purpose of the act and the rules.

25 There has to be some teeth to this or there's

1 going to be no incentive to ever play by the rules if  
2 they know the Commission says, well, they eventually  
3 comply and we'll accept that.

4 CHAIRPERSON BUSCHING: Thank you. Other  
5 questions or comments?

6 COMMISSIONER BARDORF: I guess one other  
7 question. In fairness to Mr. Smith he's relying on his  
8 accountants to do, obviously, a very complicated task.  
9 And the question is taking into account Ms. Varela's  
10 comments, and she makes good points. But, does any --  
11 aside from his word that Mr. Hill did this right this  
12 time, do we even know if he is in compliance at this  
13 point?

14 I mean, in fairness, is there some mechanism to  
15 audit the reports to see if they do match up or does  
16 that set us back to the same process? I mean, if he's  
17 in compliance now, the question is the teeth issue. But  
18 if these reports aren't even in compliance, it's sort of  
19 a moot point.

20 CHAIRPERSON BUSCHING: I don't think the  
21 reports are before us today.

22 COMMISSIONER BARDORF: Right. I'm asking  
23 generally if there's an opportunity for these to be read  
24 before anything final is undertaken.

25 MS. VARELA: I think that actually will be a

1 question more appropriate for Mr. Lee.

2 CHAIRPERSON BUSCHING: So we need to go into  
3 executive session on that?

4 MR. SMITH: Before you do, can I make one  
5 comment regarding that?

6 It is before you today on your motion for  
7 reconsideration. You'll read that we did indicate -- we  
8 did file the amended reports listing the sub vendors in  
9 compliance with 948(c). With all due respect I think it  
10 would be an issue, but I'm not going to take that legal  
11 position. I just think if you read the Motion For  
12 Reconsideration it does have that part in there.

13 CHAIRPERSON BUSCHING: But Mr. Smith, the  
14 problem is that we have -- we have to comply with the  
15 open meeting laws and we didn't have the document --

16 MR. SMITH: I understand.

17 CHAIRPERSON BUSCHING: -- in time to comply  
18 with open meeting law requirements in order to have  
19 those in front of us today.

20 MR. SMITH: Thank you.

21 CHAIRPERSON BUSCHING: So, I would like to move  
22 that we go into executive session. And while we're in  
23 executive session that we discuss the David Burnell  
24 Smith matter and the preliminary Auditor's General  
25 report.

1           Is there a second?

2           MS. JOLLEY: I will second that.

3           CHAIRPERSON BUSCHING: It's been moved by

4   Commissioner Busching and seconded by Commissioner

5   Jolley we go into executive session. All in favor say

6   "aye".

7           (Chorus of ayes.)

8           CHAIRPERSON BUSCHING: Opposed, nay?

9           Chair votes aye. Motion carries.

10          (Whereupon all persons retire from the meeting

11   room except for the Chair, Commissioners, and Mr. Lee on

12   the matter of Mr. Smith.)

13

14          (Whereupon the Commission is in executive

15   session from 10:28 a.m. until 10:55 a.m.)

16

17          (Whereupon all members of the public are

18   present and the Commission resumes in general session.)

19

20          CHAIRPERSON BUSCHING: We will -- we are back

21   in regular session. As noted before, Mr. --

22   Commissioner Scaramazzo and Commissioner Bardorf are

23   appearing in person. Commissioner Detrick and

24   Commissioner Jolley are appearing telephonically.

25          We will resume with Item IV, C, on the agenda.

Miller Certified Reporting



1 MUR 04-0023, David Burnell Smith, discussion and  
2 possible action regarding motion for rehearing or  
3 review. Possible executive session which we just  
4 completed.

5 I think at this point I will see if there's any  
6 final comments of anyone before we turn to the  
7 Commission for action.

8 Mr. Smith.

9 MR. SMITH: Just be brief. Thank you again for  
10 hearing me today. I just ask you to give me the same  
11 treatment in regards to 948(c) that you have to the  
12 other candidates. That's only fair. I think what we're  
13 trying to do here is the right thing. The right thing  
14 is comply with your regulations. Why should David  
15 Burnell Smith be treated differently?

16 I'm sure we'll go ahead with the other issues  
17 and not dismiss them. 948(c) should be dismissed. It's  
18 the right thing to do for the Clean Election  
19 Commission, and right thing to do for the State of  
20 Arizona, and right thing to do for David Burnell Smith.  
21 That's all I have to say.

22 CHAIRPERSON BUSCHING: Thank you, Mr. Smith.

23 Anyone else? If not, we'll turn to  
24 Commission discussion and possible motion. Does anyone  
25 want to start out?

1 I will start out by saying, you know, I  
2 certainly understand Mr. Smith's argument that the  
3 Commission has allowed other people to amend their  
4 campaign finance reports. And while I agree that people  
5 should be encouraged to amend their campaign finance  
6 reports, I guess my feeling is that you can get -- reach  
7 a point where it's too little too late.

8 The purpose of having accurate campaign finance  
9 reports are to let the public know, hopefully during the  
10 election, who have made contributions and where the  
11 expenditures have been made. So that this can be -- so  
12 your elector can be informed. And it makes the system  
13 worthless if we allow people to amend their campaign  
14 finance reports without any penalty whatsoever for what  
15 is now a year after these reports were first filed.

16 You'll note that we are talking about reports  
17 dating back to -- that he's, Mr. Smith, has given as to  
18 June 1st of 2004, which is over a year-and-a-quarter  
19 ago.

20 I also feel that once we have gone through an  
21 ALJ hearing and there's been full testimony there and  
22 recommendations and a neutral third-party has reviewed  
23 our action, regardless of amendments that the Commission  
24 allows up until then, there ought to be an end to it at  
25 some point.

1           And contrary to Mr. Smith saying that we've  
2    allowed other candidates to amend their reports at any  
3    time, Mr. Smith is taking that to the extreme. We've  
4    not allow amendments to reports after an ALJ hearing and  
5    changed anyone's penalty. And if we were to do so, it  
6    would be completely contrary to our previous actions at  
7    this point.

8           So, accordingly, I am not in a -- in favor of  
9    hearing his request for rehearing or review. But I'm  
10   certainly willing to listen to the arguments of my  
11   fellow commissioners.

12          COMMISSIONER SCARAMAZZO: I guess I'll jump in  
13   here and state, while I do believe that the Commission  
14   has been adamant for the past year in pursuing these  
15   decisions that we feel are applicable, I also feel that  
16   when we are talking about civil penalties, I think there  
17   are things that are definitely going to be in the best  
18   interest of the Commission representing the citizens of  
19   Arizona.

20          When we talk about potential removal from  
21   office and timing involved, I think there are issues  
22   there that lead me to believe that quite possibly I want  
23   to error on the side of caution and I want to make sure  
24   that all remedies have been resolved. And according to  
25   the advice, at least as I heard it, there's still one

1 remedy. And that would be to go ahead and ask for  
2 review with the Administrative Law Judge of one specific  
3 element that was already reviewed and that is these new  
4 reports that we have.

5 And I'm inclined to sit there and say I'm not  
6 going to as a commissioner go ahead and jump the gun.  
7 If there's one element that still is out there, then I  
8 as a commissioner want to make sure that that element is  
9 addressed, that it's answered, and with the clearest of  
10 conscious that I can proceed in a manner that I think is  
11 appropriate.

12 CHAIRPERSON BUSCHING: Thank you.

13 COMMISSIONER SCARAMAZZO: You're welcome.

14 CHAIRPERSON BUSCHING: Other comments by  
15 commissioners?

16 COMMISSIONER DETRICK: Madame Chair.

17 CHAIRPERSON BUSCHING: Commissioner Detrick.

18 COMMISSIONER DETRICK: I agree with everything  
19 you and Commissioner Scarazzo have said. But I tend to  
20 agree that we have these new reports and such a  
21 significant penalty associated with Mr. Smith that I  
22 agree that we should do a partial rehearing.

23 CHAIRPERSON BUSCHING: Okay. Other comments by  
24 commissioners?

25 COMMISSIONER BARDORF: Well I guess I just want

1 to make sure, as I said before, troubled -- as I've said  
2 a number of times now -- with the penalty that is  
3 prescribed by the statute and that I sort of harbor a  
4 desire that we would have that aired in court. And  
5 deciding whether or not that's really, in fact,  
6 appropriate in these campaigns.

7 But at the same time, I would error on the side  
8 of caution also, as I asked Mr. Smith to try to explain  
9 why these reports are so drastically different than the  
10 previous three rounds of reports. At the same time they  
11 either are right or aren't right. And I would rather  
12 have an opportunity to find out if they are right. And  
13 if they are, then that matter can be put to rest. And  
14 if they are not, we can proceed with the mechanism that  
15 is already somewhat underway.

16 So, I guess I would error on the side of  
17 caution as well.

18 CHAIRPERSON BUSCHING: Okay. Any other  
19 comments? If not, the Chair will entertain a motion.

20 COMMISSIONER SCARAMAZZO: I would move that we  
21 request rehearing or review of the evidence presented in  
22 the most recent filing, and that we ask that that be  
23 done with the upmost expediency possible.

24 CHAIRPERSON BUSCHING: Okay. Is there a  
25 second?

1 COMMISSIONER DETRICK: I'll second.

2 CHAIRPERSON BUSCHING: That's Commissioner  
3 Detrick. Was that Commissioner Detrick?

4 COMMISSIONER DETRICK: Yes.

5 CHAIRPERSON BUSCHING: I'm sorry, thank you.

6 Okay. Mr. Lee, I have a question for  
7 you. Is that motion sufficient enough for you to deal  
8 with it or do we need to clarify the motion in order to  
9 be able to vote on it, and write it up, and get it  
10 approved?

11 MR. LEE: If possible a little more clarity  
12 will be helpful. I believe the motion as it currently  
13 stands is to refer back to the Administrative Law Judge  
14 to grant a partial rehearing to consider, I believe the  
15 word was, report of the documents set out today. If the  
16 Commission can be specific not only as to consider the  
17 report of the document but what you would like the  
18 Administrative Law Judge to address in the partial  
19 rehearing.

20 CHAIRPERSON BUSCHING: Okay. Mr. Scaramazzo,  
21 are you willing to amend your motion?

22 COMMISSIONER SCARAMAZZO: Certainly. To  
23 include what we received today being the primary report,  
24 June 1st, 2004 to August 18th, 2004. Filing period  
25 August 19th, 2004 to August 26th, 2004.

1 CHAIRPERSON BUSCHING: But Mr. Smith also filed  
2 a postprimary and postgeneral report as well.

3 COMMISSIONER SCARAMAZZO: And we will include  
4 those also. Do you need me to read those?

5 CHAIRPERSON BUSCHING: No, as long as you are  
6 in agreement --

7 COMMISSIONER SCARAMAZZO: I am.

8 CHAIRPERSON BUSCHING: -- they are a part of  
9 the motion.

10 COMMISSIONER SCARAMAZZO: You bet.

11 MR. LEE: Madam Chair, members of the board,  
12 are you looking at the Administrative Law Judge to look  
13 at the accuracy of the report and pro-priority of the  
14 amendment at the time?

15 COMMISSIONER SCARAMAZZO: Correct.

16 COMMISSIONER BARDORF: Mr. Lee, is -- at this  
17 time I don't want to be hamstrung by procedure, but at  
18 the same time, I mean, do we have the authority to ask  
19 the ALJ to review these reports? Or is he constrained  
20 only to review whether or not there was any additional  
21 information that would enable Mr. Smith to submit --  
22 additional evidence to enable Mr. Smith to submit yet  
23 another set of reports after the hearing has already  
24 been held?

25 MR. LEE: I don't believe it would be within

1 the authority of the Administrative Law Judge to the  
2 finding of facts, conclusion of laws, or recommendation  
3 as to whether or not Representative Smith would or would  
4 not choose file any additional records of supplements to  
5 these reports. The direction should be headed towards  
6 asking the Administrative Law Judge to take that new  
7 evidence to conduct a hearing and determine if it's  
8 appropriate to file that report at this time and look  
9 into the accuracy of the report. All those issues are  
10 to determine whether or not his initial conclusions that  
11 there was a violation are still supported and whether or  
12 not penalties should be assessed by the Commission.

13 COMMISSIONER BARDORF: So if the ALJ first  
14 determines that there is no ground for submitting, after  
15 -- if there is no after-acquired evidence, then there is  
16 no reason to proceed further into investigating whether  
17 or not -- the ALJ would lose the ability to review  
18 whether or not these are, in fact, accurate because it  
19 would not be under his purview; is that right?

20 MR. LEE: The Administrative Law Judge, but if  
21 he reaches one decision and not reaches the other, that  
22 is a possibility. Or, he may end up addressing both  
23 issues.

24 In either event, his report should reflect to  
25 you whether or not it was appropriate to file the time



1 -- or at the time it was submitted the accuracy of the  
 2 reports, and what in effect, if any, those  
 3 determinations would have on the finding of violations  
 4 and penalty.

5 MS. FUNKHOUSER: May I ask a question since we  
 6 will be the ones that have to go back and do this? Is  
 7 it only as to 948(c), the violation of 948(c) as Mr.  
 8 Smith asked today, or re-look at all the violations.

9 CHAIRPERSON BUSCHING: Mr. Scaramazzo?

10 COMMISSIONER SCARAMAZZO: I'm just referring to  
 11 the violations that apply to these amended reports that  
 12 were filed.

13 CHAIRPERSON BUSCHING: The 948(c) issue is the  
 14 sufficient detail issue?

15 COMMISSIONER SCARAMAZZO: Right. Is that, from  
 16 a legal standpoint, is that the clarification that  
 17 you're looking for?

18 MR. LEE: If that's -- Madame Chair and Member  
 19 Scaramazzo, if that's your intent to look only at these  
 20 documents with the 948(c) issue in mind, then if your  
 21 motion reflects that, that will be the limitation on the  
 22 Administrative Law Judge's responsibility.

23 COMMISSIONER BARDORF: And appears that the  
 24 motion for reconsideration only -- this is a silly  
 25 question -- but does it extend to all the violations or

1 just the 948(c)?

2 MR. LEE: He has asked for relief on a number  
3 of grounds as to the entire decision. It would be  
4 within your authority to either grant it in full or in  
5 part. And that's what we're working with, with what you  
6 are giving the Administrative Law Judge.

7 If there are limitations, what limitations do  
8 you want to put on what issue the Administrative Law  
9 Judge could consider?

10 CHAIRPERSON BUSCHING: And Mr. Lee, with this  
11 motion, does it imply that the items that are not sent  
12 back for rehearing are affirmed or merely held in  
13 abeyance until the Administrative Law Judge comes back  
14 with a new ruling?

15 MR. LEE: In the case of a partial rehearing as  
16 is being contemplated, you would not have that order be  
17 enforceable. You would have in essence still  
18 administrative remedies being considered. However, the  
19 rest of the issues that are not sent back for rehearing,  
20 in essence would be affirmed. You would not be changing  
21 any part of the Administrative Law Judge's decision.  
22 You would not be making any change to the order you  
23 previously issued.

24 CHAIRPERSON BUSCHING: Okay. Other questions  
25 or discussions by members of the Commission?

1           COMMISSIONER BARDORF: I have a question also  
2     for the, I guess, our attorneys who handled the case.  
3     The penalties that were issued, are they -- what's the  
4     word -- attributed to the various violations?

5           I mean, I understand that, for example, the  
6     overspending violation triggers a monetary penalty of a  
7     certain sense and also I believe -- well, was it the  
8     overspending that triggered the forfeiture provision  
9     specifically or was it all the violations together?

10          MS. VARELA: It was the overspending. 942 --  
11     16-942(c) is the penalty provision that addresses the  
12     forfeiture of office.

13          I can read that to you.

14          COMMISSIONER BARDORF: No. So, correct me if  
15     I'm wrong, even a reversal on 948 will not affect the  
16     forfeiture penalty?

17          MS. VARELA: Based on Mr. Lee's -- what he just  
18     said, that would be my understanding, other than  
19     possibly to delay moving forward on whatever the  
20     Commission does not send back to the ALJ. But, based on  
21     what Mr. Lee just said, my understanding is that the  
22     overspending which triggered the forfeiture would not be  
23     affected by that.

24          COMMISSIONER BARDORF: So my question for you,  
25     Mr. Lee, is if we send this back to the ALJ with

1 directions to revisit the 948(c) violation only, does  
2 then the Superior Court appeal vis-à-vis the remaining  
3 charges proceed because they're separate?

4 Or, they're broadly, what happens?

5 MR. LEE: It isn't as clear cut an issue as I  
6 would like. I believe, however, that because you're  
7 sending part of it back, even though if you give  
8 specific directions, you don't yet know what the  
9 Administrative Law Judge's recommendation will be.

10 Certainly I will recommend that the enforcement  
11 of that not go forward and it wouldn't really constitute  
12 a final agency action, because this is all in essence  
13 one case. If any part of it is sent back on a partial  
14 rehearing, that the entire order would, in essence, be  
15 pending until that report came from the Administrative  
16 Law Judge.

17 I don't think it will be appropriate to attempt  
18 to separate the issues or separate the pieces of the  
19 case.

20 CHAIRPERSON BUSCHING: Any other questions or  
21 comments by members of the Commission?

22 COMMISSIONER DETRICK: Madame Chair?

23 CHAIRPERSON BUSCHING: Commissioner Detrick.

24 COMMISSIONER DETRICK: I'm getting confused. I  
25 don't have the reports in front of me and when I try to

1 go online with the Secretary of State's Office, I  
2 couldn't access the report.

3 But is it the point of Mr. Smith's filing these  
4 additional reports to demonstrate that he did not  
5 overspend?

6 CHAIRPERSON BUSCHING: I didn't -- I guess  
7 that's a question for Mr. Smith to answer.

8 MR. SMITH: Yes. I'll be happy to answer the  
9 question.

10 The purpose of the latest reports will be in  
11 compliance with 948(c), which I believe the reports  
12 bring us up into compliance. 948(c) is the listing of  
13 sub vendors for Mr. Querard that are -- the purpose of  
14 those reports, as indicated earlier, the last -- it's  
15 only amendments as to the 948(c) violation. Thank you.

16 COMMISSIONER DETRICK: Thanks.

17 CHAIRPERSON BUSCHING: Other questions?

18 Thank you, Mr. Smith.

19 COMMISSIONER JOLLEY: I have a question.

20 CHAIRPERSON BUSCHING: Commissioner Jolley.

21 COMMISSIONER JOLLEY: Yes. Did Mr. Smith file  
22 these reports to the Secretary of State and Citizens  
23 Clean Elections retrieve those reports through their web  
24 site?

25 What I'm getting at is why were they brought in

1 today rather than sent to us prior to the meeting?

2 CHAIRPERSON BUSCHING: Mr. Smith, can you  
3 answer that?

4 MR. SMITH: As the rules require, we filed them  
5 electronically with the Secretary of State. And the  
6 reason I brought them in today, because I put it in my  
7 motion for rehearing, I had a sneaking suspicion that  
8 you folks had not received those or went online to get  
9 them. So, I brought it just so you have a copy of that  
10 to use to make a determination. To show you that the  
11 948(c) requirements that you said rules and regulations  
12 require have been met as the other candidates have.  
13 Thank you.

14 CHAIRPERSON BUSCHING: Did that answer your  
15 question, Commissioner Jolley?

16 COMMISSIONER JOLLEY: Yes.

17 CHAIRPERSON BUSCHING: Okay. Any other  
18 questions or comments? If not, the Chair will call for  
19 the question, the motion -- I'll try and restate the  
20 motion, and please correct me if I'm inaccurate -- that  
21 the motion on the floor is that we request a partial  
22 rehearing by the Administrative Law Judge of the 948(c)  
23 issue in light of the reports, the pre-primary  
24 post-primary and post-general reports that have been  
25 delivered to the Commission today to determine whether,

1 in fact, they are in compliance with the 948(c) section  
2 of the statute.

3 COMMISSIONER BARDORF: Madame Chair, I'm sorry,  
4 I did have one more before we vote. I want to make sure  
5 we turn over all the stones here.

6 It doesn't appear that these are complete  
7 reports. If you look at the page numbers on the bottom,  
8 this is on the pre-primary, Page 1, Page 2, Page 7, Page  
9 6, Page 1, Page 3. And when you go through the  
10 post-primary it's 1, 2, 1, 2, 1, 2, 7. And these are  
11 the page numbers generated by the campaign finance  
12 software. So, I guess -- then it goes 6, 7, 6.

13 So, I guess a further question is, you know, do  
14 we even have -- well, my question is, what is this?  
15 Where are the rest of the pages? Why do we not have  
16 them? And are we really considering these documents  
17 when we make the motion?

18 MR. SMITH: Did you -- would you tell me which  
19 report you have?

20 COMMISSIONER BARDORF: All three of them are  
21 sort of out of order.

22 MR. SMITH: That's June 1. I believe it has  
23 all the pages on it and then you have the second report.

24 COMMISSIONER BARDORF: So this is June 1?  
25 August 19th --

1           CHAIRPERSON BUSCHING: Well, perhaps to make  
2     the record clear, we can -- the motion, if Mr.  
3     Scaramazzo and Mrs. Detrick are in agreement, is to say  
4     that those three reports as filed with the Secretary of  
5     State be the ones -- as currently filed with the  
6     Secretary of State -- be the ones that are reviewed by  
7     the ALJ?

8           MR. SCARAZZO: That will be acceptable.

9           COMMISSIONER DETRICK: Madame Chair.

10          CHAIRPERSON BUSCHING: Ms. Detrick.

11          COMMISSIONER DETRICK: I think I'm going to  
12     withdraw my second on the motion. If we don't have  
13     complete reports, I don't know why we would ask the ALJ  
14     to review anything. I'm going to withdraw my second.

15          MR. SMITH: I think you just had some pages  
16     missing.

17          COMMISSIONER BARDORF: I'm still missing a  
18     whole report.

19          CHAIRPERSON BUSCHING: Yep. Mine are too.

20                 We no longer have a second to this  
21     motion. Is there someone else that's willing to second  
22     Commissioner Scarazzo's motion?

23                 Well --

24          MR. SMITH: Here's the last report which is all  
25     four pages.



1 COMMISSIONER SCARAMAZZO: Commissioner Detrick,  
2 there are the copies here on the table of the complete  
3 reports.

4 COMMISSIONER DETRICK: So we actually have  
5 complete reports?

6 CHAIRPERSON BUSCHING: Ms. Bardorf is looking  
7 at this point, so bear with us for a moment.

8 COMMISSIONER BARDORF: It looks -- well, I  
9 don't know if they're complete or not, but they're  
10 definitely all in consecutive pages now. Yeah, they're  
11 all consecutive now.

12 Would you like us to send them to you? This is  
13 a sort of -- I don't know if it makes a difference to  
14 you to see them.

15 COMMISSIONER DETRICK: I just want to make sure  
16 if we're going to refer something to the ALJ, that we're  
17 referring something that actually really exists, so we  
18 don't just send something that doesn't have the  
19 appropriate information for review.

20 If you're telling me that the reports are  
21 complete and that they are amendments to original  
22 reports, then I don't have a problem with that. I just  
23 want to make sure you have them and that they are  
24 complete.

25 COMMISSIONER BARDORF: And I guess now we have

1 the pages from the middle that I didn't have before. I  
2 just observed that, again, we're back to this sort of,  
3 these are supposed to allude to the payments to  
4 Constantin Querard that were supposed to be made on  
5 August 9th. So, there aren't any of these on August 9th  
6 to sub vendors. So I don't understand how every dollar  
7 and every date changed.

8 MS. VARELA: I would like to add something if I  
9 may. As I was looking through these -- oh, sorry.

10 CHAIRPERSON BUSCHING: We currently have a  
11 motion that has a withdrawn second on it. Mr.  
12 Scaramazzo, do you want to withdraw your motion and  
13 reopen for public and Commission comments?

14 COMMISSIONER SCARAMAZZO: If that's what it  
15 takes. I was waiting for a final from Commissioner  
16 Detrick that she withdrew her second.

17 COMMISSIONER DETRICK: Madam Chair, let me just  
18 make sure I understand what you're saying. What Mr.  
19 Smith has said is that he's filing a new set of reports  
20 that now would indicate the payments in question were  
21 made after the date that he originally submitted reports  
22 on?

23 CHAIRPERSON BUSCHING: No, I don't believe so.  
24 I think he's saying that he has submitted amended  
25 reports that provide the detail of expenditures of who

1 received payments and for what they received payments  
2 for.

3 COMMISSIONER DETRICK: I thought Commissioner  
4 Bardorf indicated that there were some questions about  
5 check dates that we had originally received that no  
6 longer existed in the same format; did I misunderstand  
7 that?

8 CHAIRPERSON BUSCHING: No. She did that. But  
9 that's an -- that's an astute observation; but it's  
10 irrelevant, I believe, for the reason that Mr. Smith is  
11 filing the amended reports.

12 COMMISSIONER BARDORF: Well, that's not  
13 entirely true. Because if he had the payments to --  
14 well, if he made the payments to Mr. Querard on the  
15 19th, this would then reflect Mr. Querard subdivided the  
16 money; is that -- is that right?

17 MR. SMITH: I believe so.

18 COMMISSIONER BARDORF: Okay.

19 MR. SMITH: Just so Ms. Detrick understands,  
20 these were copies. The originals have been filed with  
21 the Secretary of State electronically. She can go on  
22 the Secretary of State's web site. Those are the  
23 reports and you can put it in your motion, the reports  
24 filed with the Secretary of State. These were just  
25 copies that I brought down. And it looks like when they

1       were copied, they were not placed in the right order.

2       But now they are in the order.

3               The issue should be the ones filed with the  
4       Secretary of State.

5               CHAIRPERSON BUSCHING: Mr. Smith, we're  
6       granting you an incredible amount of leeway on this and  
7       I hope you appreciate the fact.

8               MR. SMITH: I do appreciate it and I said thank  
9       you about four times and I'll say it again.

10              CHAIRPERSON BUSCHING: We currently have a  
11       withdrawn motion -- second and a motion on the floor. I  
12       also think there are public members that would like to  
13       comment, and as well as the Attorney General.

14              If we are going to open it up, I would like the  
15       motion to be withdrawn and open it back up. Is that  
16       acceptable, Mr. Scarazzo?

17              MR. SCARAZZO: As soon as I hear whether  
18       Commissioner Detrick has actually withdrawn the second.

19              COMMISSIONER DETRICK: Actually, I tried to go  
20       on the Secretary of State's web site. I can't access  
21       the information. I don't feel in a position to second  
22       the motion.

23              Although, I absolutely agree that, that we need  
24       to make sure that we have allowed a good opportunity for  
25       all the information to be properly reviewed at this

1 point in time. I just feel like I need to withdraw my  
2 second. I don't feel comfortable.

3 COMMISSIONER SCARAMAZZO: Then I'll withdraw  
4 the motion and we'll open it up.

5 CHAIRPERSON BUSCHING: Okay. There's no motion  
6 on the floor, so I will reopen it up for public comment  
7 starting with Ms. Varela.

8 Did you have comments?

9 MS. VARELA: Yeah. I note that Commissioner  
10 Detrick has tried to get the reports on the web site and  
11 my understanding was Nancy Read was here, but can speak  
12 to this, what gets posted on the web site and what stays  
13 posted was what was filed originally, what Mr. Smith  
14 filed way back when during the actual reporting dates is  
15 what you can actually pull up.

16 To the extent anyone wants to go and pull the  
17 things off the web site, I don't think they're going to  
18 be there. I think you have to go the Secretary of  
19 State's office.

20 I would also like to point out that what you  
21 have in front of you, which I assume is what I also have  
22 in front of me, they were passed out by Mr. Smith before  
23 the meeting. If you will notice on the bottom of these  
24 reports it says a time and I think that's where you're  
25 looking at the page numbers. 9/9 I believe 2005, which

1 my understanding is the date these were printed out.  
2 There's also up at the top of some of these, there's a  
3 fax transmission dated September 9th.

4 In his motion for rehearing or review, it says  
5 that Mr. Smith has filed a new report as of September  
6 13th. So, the report that Mr. Smith filed with the  
7 Secretary of State's file, according to his own motion,  
8 were filed September 19th. These are dated the 9th.  
9 These are four days before they got filed with the  
10 Secretary of State's office.

11 So, I too want to be sure that the Commission  
12 has the absolute correct reports in front of it before  
13 it would make any determination.

14 MR. SMITH: Let me clarify that.

15 CHAIRPERSON BUSCHING: Wait a minute, please.  
16 I'm not sure Ms. Varela is finished.

17 MS. VARELA: Just one final point. Based on  
18 Mr. Lee's statement earlier that he would recommend that  
19 the entire action sort of be pended while the 948(C) be  
20 decided, that the forfeiture of penalty issue would  
21 probably not get decided before the legislative term end  
22 and will probably be moot.

23 CHAIRPERSON BUSCHING: Okay.

24 MS. JOLLEY: Commissioner Bushing?

25 CHAIRPERSON BUSCHING: Commissioner Jolley.

1 COMMISSIONER JOLLEY: I have a question of Ms.

2 Varela. You said September of what year.

3 MS. VARELA: 2005. That's in his motion.

4 That's on Page 8 of his motion.

5 CHAIRPERSON BUSCHING: Mr. Smith.

6 MR. SMITH: I can clarify that. The copy she

7 was referring to says 9/5. Mr. Hill sent that to me or

8 faxed that to me in preparation of his filed

9 electronically version of September 13. He just wanted

10 me to see it. I think if you check with the Secretary

11 of State, according to my information, September 13th,

12 but it was after I think he sent those to me on that

13 date and that's why there's a copy of that.

14 CHAIRPERSON BUSCHING: Although, Mr. Smith, the

15 issue I think we're having is that there's a small

16 typeface down towards the bottom, talks about generated

17 campaign software of Arizona. And over on the

18 right-hand side it has a time stamp of 9/9/2005 on each

19 of those. So that appears that these were filed with

20 the Secretary of State on 9/9.

21 MR. SMITH: Perhaps they were. My

22 understanding is it was 9/13.

23 Is that a Friday?

24 COMMISSIONER BARDORF: No. Maybe.

25 CHAIRPERSON BUSCHING: Okay. Anyone else from

1 the public wishing to speak?

2 Ms. Lubin, please state your name.

3 MS. LUBIN: Barbara Lubin, L-U-B-I-N, with the  
4 Clean Elections Institute Incorporated.

5 Members of the Commission, I know how hard  
6 you're struggling and have been struggling with all the  
7 cases that come before you to be fair. To be fair to  
8 the complainants and fair to the respondents. But I  
9 really think that in your well-intended good conscious,  
10 that you are being bamboozled by Mr. Smith.

11 Mr. Smith is an expert or his accountants are  
12 experts at reshuffling his expenses to try to prove that  
13 he did not overspend. I have a spreadsheet that was  
14 done of some of his reports a year ago where he modified  
15 his campaign finance reports to try to match when he  
16 received matching funds. And I suggest that what he is  
17 doing now is he continues to shift when these expenses  
18 were to try to prove his case.

19 And he makes arguments before you talking about  
20 when checks were written. As we know, that is not what  
21 the state law in Arizona that existed long before Clean  
22 Elections to find an expenditure. It's when you agree  
23 to have goods and services rendered. Whether it's a  
24 written agreement or just calling up a printer and  
25 saying print this. That's when you got to report it.



1 Not when the check is written. And he keeps talking  
2 about when these checks were written.

3 In addition, I have a copy, and I don't know if  
4 you've seen it, of the filing in Superior Court that he  
5 made. And one of the cases that he brings up, the  
6 judges will have to look at in the case, is this matter  
7 of due process. And if he is being treatedly -- treated  
8 differently than other candidates. And, so, I'm no  
9 lawyer, but in my opinion, if in good conscious you  
10 believe that what you're doing is right, and I don't  
11 think that you're the last -- the last body that has a  
12 say on this because he included this in his court  
13 documents.

14 And I also want to remind you that while this  
15 was filed in court on September the 26th, it was not  
16 served on the State, it was not served on the  
17 Commission, and he has 180 days to serve the parties,  
18 the State. And, so, it's not as though anything is  
19 going to suddenly happen just because this was filed on  
20 the 26th.

21 This man is, I don't know if he's a shrewd  
22 country lawyer or fast talker or whatever, but his whole  
23 method has been delay, delay, delay. And I appreciate  
24 the fact that you are trying to be very thorough and  
25 very -- in your decisions, but I think that you also

1 have to remember that you are also here to protect the  
2 citizens of Arizona and not just candidates.

3 And if in deed he has overspent, the statute  
4 that says overspending by 10 percent, you shall be  
5 removed from the ballot or vacate the office. And it is  
6 a shall. It is not an option.

7 That the citizens of Arizona are really calling  
8 upon you to, you know, take an -- not just -- keep  
9 judging information that comes, and comes, and comes in  
10 a delay method, but to come up to a decision and let's  
11 get on with it.

12 The legislature is going to start in January.  
13 And if this man is holding office in an unlawful manner,  
14 it does not serve the citizens of not just his own  
15 district, but the entire state as well. Because he is  
16 voting on many, many laws both in committee and on the  
17 floor. And often times those bills are decided by one  
18 vote and it could well be his vote. And it would be  
19 very wrong for someone that was illegally holding office  
20 to make a decision that impacts all of us Arizonians.

21 COMMISSIONER BARDORF: Mr. Lee, I have another  
22 question following up on the last question I asked you.  
23 So that I understand what your last bit of advice was  
24 about splitting this action up, I can appreciate that we  
25 have new reports that would clarify the 948(c) issue and

1 I am not eager to make -- strongly affect this man's  
2 career based on, you know, if he's got the reports right  
3 now then that's great. But the other question is, is  
4 the forfeiture -- and in my mind that's very separate --  
5 there's going to be separate facts and separate issues  
6 at stake here.

7 Is it possible for that issue to go ahead and  
8 get decided once and for all? That way we have clarity  
9 on that. Or must it stay as one piece before the judge?

10 MR. LEE: I believe the matter would stay, in  
11 essence, one decision. They should not be separated on.  
12 It would be harder to make a decision on that when  
13 administrative remedies are still being pursued. So if  
14 there's a partial rehearing granted, the entire case  
15 will remain before you and it will not be a final  
16 decision that will be receivable in Superior Court until  
17 the Administrative Law Judge's decision comes back and  
18 you make a judgment on that recommended decision.

19 If the 948(c) violation is not, in essence, the  
20 permanent center of this case. It is, in essence, a  
21 peripheral issue as opposed to the second issue.

22 The Commission could always deny the motion for  
23 rehearing and allow the matter to go forward and hope  
24 for expeditious resolution by the courts of the state in  
25 order to satisfy the concerns of citizenry and other

1 issues that have been expressed.

2 So those are things you have to take into  
3 consideration or may want to take into consideration.  
4 You know, how do you move the case forward? What is the  
5 central issue in the case? What is the direction you  
6 want to go with moving this matter forward?

7 COMMISSIONER BARDORF: I have a question then  
8 for Mr. Smith. You said that these amended reports will  
9 show the level of sort of sub vendor detail that we are  
10 looking for. If the ALJ were to look at these, would  
11 these disprove the overspending?

12 I mean, will these numbers, if the ALJ were to  
13 look at this whole thing over again, would these amended  
14 reports address that issue too or do they only resolve  
15 the sub vendors?

16 Or do the numbers match up?

17 MR. SMITH: I would say this in regard to sub  
18 vendors, that is the purpose of the amendment on the  
19 13th or 9th, whenever they were done. That's the 948(c)  
20 issue. We argued initially and he heard that decision,  
21 but he ruled against us as to whether or not those --  
22 that report, the previous report, governed and whether  
23 or not we overspent.

24 As she -- as Ms. Varela indicated, she didn't  
25 agree with our position, didn't agree with our

1 accountant. As I understand, we have no motion, which  
2 we had a motion before on 948(c), he would just look and  
3 say did he comply with these amended reports? That's  
4 the purpose of the new amended -- that's the purpose  
5 that I came to you today, was to get a rehearing on  
6 948(c).

7 I didn't expect, although we made our  
8 arguments, we knew you probably wouldn't address those  
9 other issues. My concern today is the 948(c), which I  
10 think we presented evidence that we complied with the  
11 Commission's rules and regulations. And I believe now  
12 we submit this to the Administrative Law Judge, I think  
13 he will agree with us and that issue will be done with,  
14 and then move on to the two issue, whether or not I  
15 repay the \$4,000 or whether or not I be removed from  
16 office.

17 COMMISSIONER BARDORF: So, these will show sub  
18 vendors to whom the moneys went. Will the dates have  
19 changed, and the total dollar amount have changed from  
20 the previous report?

21 MR. SMITH: Well, the dollar amounts only  
22 change because what we pay Mr. Querard on --

23 COMMISSIONER BARDORF: Right. But the totals  
24 will remain the same and all the dates will remain the  
25 same when the expenditures were made, it will just be

1 maybe one for every sub payment?

2 MR. SMITH: Correct. That's the way I  
3 understand it.

4 COMMISSIONER BARDORF: So, it shouldn't have  
5 changed the timing of any payments and won't have  
6 changed when the expenditures were made?

7 MR. SMITH: Let me say this again. Every  
8 expenditure was listed and shows when the separate  
9 checks were written and if those checks were written,  
10 those are the dates of expenditures. There's cash and  
11 it will show the date --

12 COMMISSIONER BARDORF: Well --

13 MR. SMITH: There's cash and whatever it will  
14 show the date --

15 COMMISSIONER BARDORF: These show when checks  
16 were written not when expenditures were incurred?

17 MR. SMITH: Yes. Right.

18 COMMISSIONER BARDORF: Okay.

19 CHAIRPERSON BUSCHING: Any other comments by  
20 members of the public or questions or comments by  
21 members of the Commission? If not, the Chair will  
22 entertain a motion.

23 COMMISSIONER BARDORF: Madame Chair.

24 CHAIRPERSON BUSCHING: Commissioner Bardorf.

25 COMMISSIONER BARDORF: I'm glad we had this

1 discussion. I would move that we deny the motion for  
2 rehearing in its entirety.

3 CHAIRPERSON BUSCHING: Is there a second?

4 MS. JOLLEY: I'll second that. Commissioner  
5 Jolley.

6 CHAIRPERSON BUSCHING: It's been moved by  
7 Commissioner Bardorf and seconded by Commissioner Jolley  
8 that we deny the motion for rehearing in its entirety.

9 Further discussion?

10 I will say for the record that I certainly am  
11 in support of that motion. I, as I mentioned earlier on  
12 in our discussions this morning, I feel very strongly  
13 that when the process has gone on so long that we should  
14 not give deference to candidates to allow them to come  
15 into compliance without certain penalties. And while I  
16 realize that the penalty in this case is harsh, we have  
17 spent an inordinate amount of time on this case.

18 And this is not a case where the information  
19 was not available to Mr. Smith. Mr. Querard was given  
20 the documents -- gave the documents he needed -- giving  
21 the details to the Commission back in December. There  
22 were months and months of opportunity for Mr. Smith to  
23 revise his reports, long even before the ALJ's hearing.  
24 And so to me at this point, I am not willing to give Mr.  
25 Smith further review or deference in the situation. So

1 I am in support of the motion.

2 Other comments?

3 COMMISSIONER BARDORF: I just -- I just further  
4 that, that I think it's best for everybody if this just  
5 gets resolved in the most expeditious way. And I think  
6 the way is to present this whole thing whole cloth, and  
7 I don't think it benefits to have the ALJ to only look  
8 at part of this. I would rather see it gets decided in  
9 a final manner and by somebody who is presented all the  
10 evidence. And hopefully this is everything now and we  
11 can get it resolved.

12 CHAIRPERSON BUSCHING: Other comments? If not,  
13 the Chair will call for the question, the motion on the  
14 floor. It's been moved by Commissioner Bardorf and  
15 seconded by Commissioner Jolley that we deny the motion  
16 for rehearing or review in total.

17 All in favor say "aye".

18 COMMISSIONER BARDORF: Aye.

19 COMMISSIONER JOLLEY: Aye.

20 COMMISSIONER DETRICK: Aye.

21 CHAIRPERSON BUSCHING: All opposed say no.

22 COMMISSIONER SCARAMAZZO: No.

23 CHAIRPERSON BUSCHING: Chair votes aye. Motion  
24 carries four to one.

25 And then we'll go on to Item No. V on the



1 agenda, discussion and possible action on preliminary  
2 auditor general report, possible executive session which  
3 we've already had.

4 So, we've received information on the draft  
5 auditor general report; and Mr. Lang, would it be  
6 appropriate to have a motion approving the draft of the  
7 report and your draft responses?

8 MR. LANG: That would be appropriate, Madame  
9 Chair.

10 CHAIRPERSON BUSCHING: Okay. Are there any  
11 members of the public wishing to speak to this matter?

12 Okay. If not, the Chair will entertain a  
13 motion.

14 COMMISSIONER JOLLEY: This is Commissioner  
15 Jolley and I move we accept the report as dated by the  
16 Auditor General.

17 CHAIRPERSON BUSCHING: And Mr. Lang's draft  
18 responses?

19 COMMISSIONER JOLLEY: That's correct. Mr.  
20 Lang's draft responses.

21 CHAIRPERSON BUSCHING: Thank you.

22 MR. SCARAZZO: I'll second that.

23 CHAIRPERSON BUSCHING: It's been moved by  
24 Commissioner Jolley and seconded by Commissioner  
25 Scarazzo that we accept the preliminary Auditor General

1 report together with the Executive Director's draft  
2 responses.

3 Any further discussion? If not, the Chair will  
4 call for the question, all in favor say "aye."

5 (Chorus of ayes.)

6 CHAIRPERSON BUSCHING: Opposed, nay?

7 Chair votes aye. The motion carries.

8 Item IV, B -- sorry -- MUR 04-0020, David  
9 Gowan. Discussion and possible action regarding  
10 designation of Commission representative for purpose of  
11 informal settlement conference.

12 Mr. Lang, any communication with Mr.  
13 Gowan?

14 MR. LANG: After several tries, Madame Chair,  
15 staff was able to reach Mr. Gowan -- I think Jennifer  
16 Richardson -- Mr. Gowan expressed willingness to travel  
17 to Phoenix or extend the time beyond the 10th in order  
18 to facilitate a settlement discussion.

19 CHAIRPERSON BUSCHING: Great. We appreciate  
20 his flexibility.

21 In light of that, Ms. Bardorf?

22 COMMISSIONER BARDORF: I could do it  
23 tomorrow -- well, I could do Thursday or Friday. And I  
24 can e-mail you my schedule for next week.

25 MR. LANG: Okay. We will try to schedule that

1 up.

2 CHAIRPERSON BUSCHING: That will be good.

3 COMMISSIONER BARDORF: Notice you didn't

4 forget. Are you -- I'm exhausted now I can't -- yes, I

5 am.

6 CHAIRPERSON BUSCHING: All right. Any further

7 discussion? If not, the Chair will entertain a motion.

8 COMMISSIONER SCARAMAZZO: I'd move that we

9 designate Commissioner Bardorf to enter into discussion

10 regarding purposes of informal settlement conference

11 with David Gowan, MUR 04-0020.

12 CHAIRPERSON BUSCHING: Is there a second?

13 COMMISSIONER JOLLEY: I'll second that. This is

14 Commissioner Jolley.

15 CHAIRPERSON BUSCHING: It's been moved by

16 Commissioner Scaramazzo and seconded by Commissioner

17 Jolley that we designate Commissioner Bardorf as the

18 informal settlement conference representative.

19 Any further discussions? If not, the Chair

20 will call for the question, all in favor say "aye".

21 (Chorus of ayes.)

22 CHAIRPERSON BUSCHING: Opposed, nay?

23 Chair votes aye. Motion carries.

24 Commissioner Detrick, I didn't hear you. Are

25 you still there? Commissioner Detrick?

1 COMMISSIONER DETRICK: I voted aye.

2 CHAIRPERSON BUSCHING: Okay. Thank you.

3 Sorry.

4 Item VI, call for public comment. This is the  
5 time for consideration and discussion of comments and  
6 complaints from the public. Action taken as a result of  
7 public comment will be limited to directing staff to  
8 study the matter or rescheduling the matter for further  
9 consideration and decision at a later date or responding  
10 to criticism.

11 MS. LUGIN: Barbara Lugin again with the Clean  
12 Elections Institute. It's been a long meeting and sure  
13 we all can use some lunch.

14 It's my understanding that since you have  
15 denied the rehearing, that Mr. David Burnell Smith's  
16 seat in the House of Representative is vacant and staff  
17 and attorneys are directed to proceed with whatever is  
18 next. I just ask you since you have to do -- actually  
19 it would be the chairman because it's not noticed on the  
20 public meeting. But anyway let's keep the ball rolling  
21 is, I guess, what I'm basically saying.

22 CHAIRPERSON BUSCHING: Thank you. Any other  
23 public comment?

24 If not, Item VII, adjournment. Entertain  
25 a motion?

1 COMMISSIONER BARDORF: I move that we adjourn.  
2 MS. JOLLEY: I'll second that.  
3 CHAIRPERSON BUSCHING: It's been moved by  
4 Commissioner Bardorf and seconded by Commissioner Jolley  
5 that we adjourn the meeting.  
6 All in favor say "aye".  
7 (Chorus of ayes.)  
8 CHAIRPERSON BUSCHING: Opposed, nay?  
9 Chair votes aye. Motion carries.  
10 This meeting is adjourned.  
11  
12 (Whereupon the proceeding concluded at 11:47  
13 a.m.)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## 1           C E R T I F I C A T E

2

3           I, Angela Furniss Miller, Certified Reporter,  
4 do hereby certify that the foregoing pages numbered 1  
5 through 77, inclusive, constitute a full and accurate  
6 printed record of my stenographic notes taken at said  
7 time and place, all done to the best of my skill and  
8 ability.

9           DATED, at Phoenix, this 6th day of October,  
10 2005.

11

12

13

14           Angela Furniss Miller, RPR  
            Certified Reporter (AZ50127)

15

16

17

18

19

20

21

22

23

24

25

Miller Certified Reporting